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IN THE

Supreme Court of the United States

OCTOBER TERM, A.D. 1965

No. 1036

CLARENCE BROOKS,

Petitioner,

VS.

THE UNITED STATES OF AMERICA,

Respondent.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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Respondent.

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To The Honorable, The Chief Justice and Associate Justices of the Supreme Court of the United States.

The petitioner, Clarence Brooks, prays that a writ of certiorari be issued to review the decision of the United States Court of Appeals for the Seventh Circuit in the above case.

JUDGMENT AND OPINION OF THE COURT BELOW.

The judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was entered on September 28, 1964, and is not reported but appears in the printed Appendix filed with, and certified by, the Clerk of the United States Court of Appeals as a part of the record, and transmitted herewith.

The opinion of the United States Court of Appeals for the Seventh Circuit, affirming said judgment, was filed December 21, 1965, is set forth in Appendix C hereto, *infra* pp. 5a-8a.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on December 21, 1965. On January 20, 1966, within thirty days of the aforesaid judgment, petitioner moved the entry of an order extending his time to apply for a writ of certiorari to and including February 18, 1966. On January 21, 1966, it was ordered that petitioner's time to file petition for writ of certiorari be extended to February 18, 1966. (Appendix D)

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED.

When, over objection, the trial Court heard the full text of a confession, reserving its ruling on involuntariness, and adjudicated at the close of all the evidence that the confession it had heard in its totality was indeed involuntary, does the involuntary confession so heard vitiate the judgment because it violates the constitutional guarantees of the 5th Amendment to the Constitution of the United States?

STATUTES INVOLVED.

The statutory provisions involved are 18 U.S.C., Sec. 2; 21 U.S.C., Sec. 174; 26 U.S.C., 4705(a) and 28 U.S.C., Sec. 1254. They are printed in Appendix A, *infra*, pp. 1a-2a.

STATEMENT OF THE CASE.

A 2-count indictment, 64 CR 326, was returned against the defendants, Clarence Brooks and Herman McCall, on May 21, 1964, charging them with the unlawful sale of a narcotic drug, receiving, concealing and facilitating transportation of narcotics, and aiding and abetting, in violation of Section 4705(a), Title 26, Section 174, Title 21 and Section 2, Title 18 of the United States Code.

Defendants waived a jury and trial commenced on September 28, 1964, which trial was continued from day to day, and concluded on October 15, 1964.

The defendants were convicted in the Court below and each was sentenced to a term of 10 years on each count, to run concurrently, in the custody of the Attorney General.

The Court set appeal bonds in the amount of $2,500.00 as to each defendant.

The United States Court of Appeals for the Seventh Circuit affirmed the judgment of the United States District Court for the Northern District of Illinois, Eastern Division. (The defendant, Herman McCall, is not a party to this appeal).

STATEMENT OF FACTS.

Carl Jackson testified that he is a narcotic agent and that on November 20, 1962, he and an informer Robert Vaughn drove to the vicinity of 47th Street and Champlain Avenue where the informer introduced him to Herman McCall. He asked McCall to get him a spoon of heroin. He observed McCall approach and converse with Clarence Brooks, who was repairing an automobile tire in front of 4647½ Langley. He gave McCall $125 and he observed McCall approach and converse with Brooks a second time (about 5:30 P.M.), they drove to McCall's house to await a telephone call from Brooks. They stayed all night at McCall's, the phone call never materialized. They went to Brook's place of business the next morning at 8:00 A.M. McCall entered the shop, returned to the car. Brooks came to the government car and stated that he had used the money. "I took a title to Brooks' truck as security." Again at 11:00 A.M., he returned to Brooks' shop and told Brooks that if he didn't have the stuff at 2:00, he was going to keep the title and probably get title to Brooks' second truck. At 2:00, he returned and Brooks had gotten the stuff and told him it was underneath the car floor mat. Brooks was arrested two months later, namely on January 23, 1963.

On cross examination, David Connolly testified that on January 24, 1963, he saw McCall go in and out of Brooks' shop three to twenty times on November 20, 1962. On January 24, 1963, about 10:00 P.M., he and another agent arrested Brooks and immediately drove Brooks to a dark, quiet spot in a parking lot or in an alley and parked and

talked with Brooks. He told Brooks if Brooks cooperated it would be brought to the attention of the U. S. Attorney handling his case. Agent Connolly stated that Brooks answered all questions and submitted a written statement while at the Bureau of Narcotics on January 23, 1963, before he was incarcerated for the night. Agent Connolly appeared before the U. S. Commissioner the next morning on January 24, 1963, and may have told the Commissioner that Brooks had agreed to cooperate. Brooks did work thereafter to initiate narcotic investigation.

Defendant moved for a ruling that Brooks' confession was involuntarily given and inadmissible.

The motion was overruled, the confession was admitted into evidence and read into the record. The Court, at the end of the trial, vacated its ruling and ruled that the confession was involuntarily given and therefore inadmissible.

There was a finding of guilty entered against the defendants.

REASONS FOR GRANTING THE WRIT.

The decision of the Court below in the instant case violates the constitutional guarantees of the 5th Amendment.

Over objection of Brooks, the Court below admitted into evidence Brooks' confession during the trial, permitted the entire confession read into the record by the government. Subsequently, at the conclusion of the government's case, the Court vacated this order admitting the confession and reserved ruling until the close of all of the evidence. Thereafter, at the close of all the evidence and after arguments of counsel, the Court ruled that the confession was involuntarily given and therefore inadmissible and stated, "I will not read it." A finding of guilty was entered against both defendants.

The contention that there is substantial support, apart from the confession, for the conviction of Clarence Brooks and that the District Court did not rely upon the confession, is quite without merit. The record affirmatively shows that the evidence of the petitioner's confession was admitted and considered by the trial court. The Court could not possibly hear this confession and the lengthy cross examination of Brooks as well as of other witnesses concerning the confession and then dismiss it from its mind as though the confession had never been heard. Certainly, the Court was influenced by the evidence which included, in large measure, Brooks' involuntary confession.

The Supreme Court of the United States in *Payne* v. *Arkansas,* 356 U.C. 560, in unmistakable terms rejected

this divisible theory, that the Court may on the one hand hear the text of a confession and completely disregard it in arriving at its judgment. As was there said:

> "This Court has uniformly held that even though there may have been sufficient evidence, apart from the coerced confession, to support a judgment of conviction, the admission in evidence, over objection, of the coerced confession vitiates the judgment, because it violates the Due Process Clause of the 14th Amendment." *Lynum* v. *Illinois,* 372 U.S. 528.

The argument that the *Payne* and *Lynum* cases are irrelevant because the confessions were not suppressed is begging the question. It is our contention that the final ruling of the District Court suppressing the confession in the instant case, after having ruled it admissible during the trial and having heard the confession in its entirety, does not purge the record of its infirmities. The net effect is that the confession was admitted, considered and affected the Court's judgment to the defendant Brooks' detriment. Brooks, in effect, was compelled to be a witness against himself in contravention to the constitutional guarantees of the 5th Amendment.

CONCLUSION.

For the foregoing reason, the petition for a writ of certiorari should be granted.

Respectfully submitted,

JEWEL LAFONTANT,
Counsel for Petitioner.

February 16, 1966.

APPENDIX A

Statutes And Constitutional Amendment.

18 U.S.C. Sec. 2

(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is a principal.

(b) Whoever causes an act to be done, which if directly performed by him would be an offense against the United States, is also a principal and punishable as such.

21 U.S.C. Sec. 174

Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported or brought into the United States contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be imprisoned not less than five or more than twenty years and, in addition, may be fined not more than $20,000. For a second or subsequent offense (as determined under section 7237(c) of the Internal Revenue Code of 1954), the offender shall be imprisoned not less than ten or more than forty years and, in addition, may be fined not more than $20,000.

Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

(Statutes Involved)

For the provision relating to sentencing, probation, etc., see section 7237(d) of the Internal Revenue Code of 1954. Feb. 9, 1909, c. 100, Sec. 2(c), (f), 35 Stat. 614; Jan. 17, 1914, c. 9, 38 Stat. 275; May 26, 1922, c. 202, Sec. 1, 42 Stat. 596; June 7, 1924, c. 352, 43 Stat. 657; Nov. 2, 1951, c. 666, Secs. 1, 5(1), 65 Stat. 767; July 18, 1956, c. 629, Title I, Sec. 105, 70 Stat. 570.

26 U.S.C. Sec. 4705(a)

It shall be unlawful for any person to sell, barter, exchange, or give away narcotic drugs except in pursuance of a written order of the person to whom such article is sold, bartered, exchanged, or given, on a form to be issued in blank for that purpose by the Secretary or his delegate.

28 U.S.C. Sec. 1254

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented;

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy. June 25, 1948, c. 646, 62 State. 928.

(Constitutional Amendment)

5th Amendment to the Constitution of the United States

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

APPENDIX B

In The
UNITED STATES DISTRICT COURT
For The Northern District Of Illinois
Eastern Division

UNITED STATES OF AMERICA,
Plaintiff,
vs.
CLARENCE BROOKS and HERMAN McCALL,
Defendants.

No. 64 CR 326

October 15, 1964

Before Hon. J. Sam Perry, Judge.

There is pending objection to Exhibit No. 3 and I treated it as a motion to suppress. The objection is sustained and the confession is suppressed. I will not read it.

I do not want to be misunderstood. I take the evidence of the Government as the credible evidence in connection with that. I adopt the testimony. I believe it was credible. I do not believe the testimony of the defendants was credible. I believe, though, that under all the circumstances—the indictment having been not returned against Brooks at first and then later being done, indicates to me that in his mind—I do not believe there was an overt promise made to him—but in his mind, under all the circumstances, that there was such promise, some promise or belief that there had been some promise in his mind. Therefore, I suppress it.

However, on all the evidence that is presented to me, I find each of the defendants, Brooks and McCall, guilty.

APPENDIX C

In The
UNITED STATES COURT OF APPEALS
For the Seventh Circuit

SEPTEMBER TERM, 1965 SEPTEMBER SESSION, 1965
Nos. 15013-14

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CLARENCE BROOKS and HERMAN McCALL,
Defendants-Appellants.

Appeals from the United States District Court for the Northern District of Illinois, Eastern Division.

DECEMBER 21, 1965

Before SCHNACKENBERG, KILEY and SWYGERT, *Circuit Judges.*

KILEY, *Circuit Judge.* Brooks was convicted by the district court, without a jury, under a two-count indictment of selling narcotics,[1] and McCall convicted under the same counts of aiding in the sales.[2] Concurrent sentences were imposed. Both have appealed. We affirm as to both.

[1] 26 U.S.C. § 4705(a) and 21 U.S.C. § 174.
[2] 18 U.S.C. § 2.

(Opinion of the U. S. Court of Appeals)

A narcotics agent was introduced to McCall, an addict, by an informant, Vaughn. McCall, with money furnished by the agent, purchased heroin from Brooks at the time alleged in the indictment. The adequacy of proof is not contested. The contention here is that Brooks and McCall were trapped into the offense by the Government.

Their arguments on entrapment assume the truth of the defense testimony that Vaughn planted the seed of the offense in the mind of McCall, an addict in need of heroin; and that McCall, to win a reward of heroin promised by Vaughn to satisfy his need, propagated the seed in the mind of Brooks to induce the sale. But the district court did not believe this testimony. And the testimony of the Government witnesses plus the prior narcotic records of defendants warranted the court's inference that defendants were predisposed to commit the offense; and that the Government agent and informer merely afforded the "opportunity" for the crime. *Sherman* v. *United States,* 356 U.S. 369, 372-73 (1958), *Sorrells* v. *United States,* 287 U.S. 435, 441 (1932). Defendants were not entitled to acquittal on the ground of entrapment.

A second contention is that Brooks' fifth amendment rights were violated by the district court's treatment of an involuntary confession made by him.

At the trial an agent identified the confession after testifying that Brooks, before signing, had been advised of his right not to answer and that he signed of "his own voluntary will." Over objection of Brooks, the confession was admitted as to him, with the qualification by the court that if cross-examination showed involuntariness, the confession "will be stricken." On cross-examination, it developed that when agents arrested Brooks about two months after his sale of heroin to McCall, he was told that if he cooperated that fact would

be brought to the attention of the United States Attorney "handling his case." Brooks later signed a confession at the Narcotics Bureau.

At the conclusion of the Government's case, Brooks' attorney renewed objection to the confession and moved the court, in the light of *Lynumn* v. *Illinois*, 372 U.S. 528 (1963), to reserve ruling on its introduction until the close of all the evidence. The court vacated its order admitting the confession and reserved ruling. Thereafter, and before the Government rested its case, the court admitted the confession subject to disregarding it if "coercion" was shown by further evidence "limited" to the issue of involuntariness of the confession. Brooks testified on this limited issue and, after argument by counsel, Brooks' objection was overruled, the confession was admitted and read by the court.

At the close of all the evidence, and after arguments, the court sustained the objection, suppressed the confession, and said, "I will not read it." The court inferred from the testimony that there was a promise, or a belief on Brooks' part of a promise of aid.

Brooks argues that, on that record, it cannot reasonably be said that the court, knowing the substance of the confession, dismissed it from his mind, and "took no account" of it in arriving at a judgment.

There is no merit in this argument. Brooks waived a jury trial and submitted his cause to the judge. Had a preliminary hearing on the issue of voluntariness been held, according to approved procedure, the court would know that Brooks had made a confession and would have been duty bound after a ruling of inadmissibility to disregard it in determining guilt. This is a common function in the work of trial judges, and the absence of a rule requiring one judge to hear the testimony on voluntariness of a confession and another to determine

guilt indicates satisfaction with the present practice. To hold otherwise would work an undue and unwarranted burden on district courts, especially in a case like this, where the issue of voluntariness does not arise until after the trial has commenced and defendant has waived a jury trial. Our jurisprudence postulates the ability of judges to dismiss from their minds, in reaching decisions, offers of evidence excluded by rulings after hearing arguments on admissibility of that evidence.

No reason is advanced by Brooks for presuming that in this case the district court was not able to, and did not, disregard the confession he ordered suppressed. There is substantial support, apart from the suppressed confession, for the conviction of both McCall and Brooks, and this is what the district court relied on. The decision in *Payne* v. *Arkansas,* 356 U.S. 560 (1958), involving the jury trial of a murder case, where the coerced confession had been admitted for consideration by the jury, does not militate against our conclusion on this point. And in *Lynumn* v. *Illinois,* 372 U.S. 528, 536-37 (1963), the motion to strike the incriminating testimony, found to have been involuntarily given, was denied, and the State court admitted and considered the testimony. The United States Supreme Court found the testimony "coerced" and reversed, refusing to accept the harmless error doctrine. Neither *Payne* nor *Lynumn* is our case. Here the confession was suppressed and not relied upon for conviction.

The judgments are affirmed.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

APPENDIX D

SUPREME COURT OF THE UNITED STATES
No. ....., October Term, 1965

CLARENCE BROOKS,
Petitioner,

VS.

UNITED STATES.

Order Extending Time To File Petition For Writ Of Certiorari.

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 18, 1966, provided the application is timely filed.

/s/ Tom C. Clark
Associate Justice of the Supreme Court of the United States

Dated this 21 day of January, 1966.

In the Supreme Court of the United States

OCTOBER TERM, 1965

No. 1036

CLARENCE BROOKS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. C) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on December 21, 1965. On January 21, 1966, Mr. Justice Clark extended the time for filing a petition for a writ of certiorari to February 18, 1966, without prejudice to the Court's consideration of the timeliness of the application. The petition was filed on February 17, 1966. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

331-002—66

QUESTION PRESENTED

Whether, in a non-jury trial, the judge was competent to render a verdict after he suppressed petitioner's confession as involuntary.

STATEMENT

On October 15, 1964, petitioner and his co-defendant, Herman McCall, were convicted by a judge sitting without a jury in the United States District Court for the Northern District of Illinois of violating federal narcotics laws, 26 U.S.C. 4705(a) and 21 U.S.C. 174. Petitioner was sentenced to imprisonment for ten years on each count, to run concurrently. The court of appeals affirmed.

1. The evidence showed that on November 20, 1962, Robert Vaughn, an informer, introduced undercover agent Carl Jackson to McCall, from whom Vaughn had purchased narcotics on prior occasions (Tr. 15, 147–148). Jackson gave McCall $125 to obtain a "spoon" of heroin (Tr. 16). After McCall made a telephone call, the three proceeded in Jackson's car to petitioner's place of business in Chicago. There McCall left the car and engaged in a conversation with petitioner, after which he returned to the car and announced that the heroin would be procured shortly (Tr. 17–18). After waiting all night in McCall's residence, Jackson and Vaughn returned to petitioner's store at 8 and 11 a.m., on November 21, and both times were told by petitioner that he had not yet obtained the heroin (Tr. 22–28). At 2 p.m. Jackson, Vaughn and McCall drove to petitioner's premises. Petitioner passed by in his automobile, which he parked in front of Jackson's car. He walked back

to Jackson's car, and, after apologizing for the delay, advised Jackson that the heroin could be found under the floor mat of petitioner's car. Jackson obtained the heroin, which had been enclosed in a glassine bag and manila envelope (Gov. Exs. 1–2; Tr. 29–41).

2. On January 23, 1963, petitioner was arrested by federal narcotics agent Connolly, who had maintained a surveillance of petitioner, and had observed him, immediately preceding the final encounter with Jackson, meet and converse with a man later identified as one of petitioner's sources of supply (Tr. 109–124, 128). Petitioner was placed in Connolly's car and they proceeded to McCall's residence. On the way, Connolly parked his car and conversed with petitioner in an attempt to solicit petitioner's cooperation (Tr. 157–163). Connolly offered to advise the United States Attorney's office of any cooperation (Tr. 190). Petitioner agreed to assist the agents and believed that his case would be dropped because of his cooperation (Tr. 379–380). At the narcotics headquarters, petitioner signed a statement admitting that he sold narcotics to Jackson. Subsequently, petitioner assisted federal agents by engaging in purchases of narcotics (Tr. 175).

At the non-jury trial, the judge heard extensive testimony concerning the voluntariness of petitioner's statement but reserved his ruling. After both sides had concluded, the judge declared (Tr. 506):

> There is pending objection to Exhibit No. 3 and I treated it as a motion to suppress. The objection is sustained and the confession is suppressed. I will not read it.

I do not want to be misunderstood. I take the evidence of the Government as the credible evidence in connection with that. I adopt the testimony. I believe it was credible. I do not believe the testimony of the defendants was credible. I believe, though, that under all the circumstances—the indictment having been not returned against Brooks at first and then later being done, indicates to me that in his mind—I do not believe there was an overt promise made to him—but in his mind, under all the circumstances, that there was such promise, some promise or belief that there had been some promise in his mind. Therefore, I suppress it.

However, on all the evidence that is presented to me, I find each of the defendants, Brooks and McCall, guilty.

ARGUMENT

Since petitioner did not obtain, within thirty days of the judgment below, an extension of time within which to file his petition, the petition is out of time. There is, in any event, no reason for further review of this case.

The record shows that petitioner knowingly and deliberately waived his right to a jury trial (Tr. 4) (*Patton* v. *United States*, 281 U.S. 276; *Singer* v. *United States*, 380 U.S. 24), and he knew that, as the inevitable result of his waiver, the trier of fact would also make the preliminary determination of the vol-

untariness of his confession.[1] Simply because a result that was "insistently invited, namely, a verdict by a court without a jury, disappointed the hopes of the accused, ought not to be sufficient for rejecting it." *Adams* v. *United States ex rel. McCann*, 317 U.S. 269, 281. Therefore, petitioner should not now be heard to complain that the trial judge was apprised of the fact that there had been a confession.

At all events, judges are frequently required to disregard inadmissible evidence in determining guilt, and this procedure involves no denial of a defendant's rights. "Our jurisprudence postulates the ability of judges to dismiss from their minds, in reaching decisions, offers of evidence excluded by rulings after hearing arguments on admissibility of that evidence" (Pet. App. C). Indeed, in this very trial, the judge on several occasions was called upon to eliminate from his mind evidence applicable to only one of the two co-defendants, when considering the merits of the case against the other (Tr. 43, 129–130, 267).

The decisions relied upon by petitioner are inapposite. In *Payne* v. *Arkansas*, 356 U.S. 560, this Court determined that when the appellate tribunal

[1] This case was tried more than three months after the decision in *Jackson* v. *Denno*, 378 U.S. 368, was reported, which held that in a jury trial the judge must make the determination of voluntariness, and so keep the jury from considering an involuntary confession. Petitioner here still preferred a non-jury trial.

rules that a confession admitted in evidence was involuntary, the jury's finding of guilty must be reversed without considering whether the evidence apart from the confession could sustain the conviction, because there was no way of determining what credit and weight the jury gave to the confession. The same reasoning was applied in *Lynumn* v. *Illinois*, 372 U.S. 528, a non-jury case, where the judge admitted and considered a confession subsequently held on appeal to be inadmissible. In the instant case the judge made clear that he completely ignored the confession after ruling that it was illegally obtained (Tr. 506).

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

THURGOOD MARSHALL,
Solicitor General.
FRED M. VINSON, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
MELVYN HAMBURG,
Attorneys.

MARCH 1966.

U.S. GOVERNMENT PRINTING OFFICE: 1966